

bearing the cost of default by BOC affiliates."⁵¹ Moreover, and perhaps most importantly for these proceedings, the provision also serves to discourage BOCs from discriminating against non-affiliated carriers. Any debt association, particularly an arrangement where the BOC would ultimately serve as the guarantor of the debt, creates additional incentives for the BOC to ensure the financial success of the interexchange affiliate. Consequently, a BOC will be more likely to engage in discriminatory behavior against unaffiliated entities in its efforts to promote the financial success of its interexchange subsidiary, thereby protecting its own financial interest.

In sum, CompTel urges the Commission to prohibit BOCs from becoming involved in the affiliate's financial matters altogether. To attempt to distinguish what types of credit arrangements might be permitted pursuant to Section 272(b)(4), as the Commission proposes to do,⁵² would only result in more ambiguities and additional regulatory oversight. Accordingly, a total prohibition against any credit arrangements between BOCs and their interexchange affiliates is the most effective way to implement Section 272(b)(4) as intended by Congress.

D. The Act Prohibits the Sharing of Both In-House Functions and Outside Functions (¶ 62)

A main thrust of the Act's structural separation provisions is to ensure that BOCs in no way utilize their local exchange operations to subsidize or otherwise promote the operations of the interexchange affiliates. To realize this goal, it is imperative that the Commission enforce complete segregation of all business functions between the BOC and the interexchange affiliate,

⁵¹ *NPRM* at ¶ 63.

⁵² In the *NPRM*, the Commission tentatively concludes that "a BOC may not co-sign a contract, or any other instrument with a separate affiliate that would allow the affiliate to obtain credit in a manner that violates Section 272(b)(4)." *Id.* The Commission goes on to request comment concerning whether it should establish specific requirements regarding the types of activities that are contemplated by arrangements consistent with Section 272(b)(4). *See id.*

including administrative functions. This general prohibition would foreclose the sharing of in-house functions (*e.g.*, personnel and accounting) as well as outside functions (*e.g.*, insurance, pension plans and legal activities).

Although the Commission permitted certain administrative services to be shared on a cost reimbursable basis in *Computer II*, CompTel submits the Commission's reasons for doing so are not present in this instance. In *Computer II*, the Commission's decision to permit the sharing of some administrative functions emphasized three considerations. First, the regulated market would continue to interact with the competitive market and commerce between the two would allow the protection of any economies of scale that presently exist in the underlying facility production. Second, the separated entities would provide services unique to the competitive market, relying for the most part, on highly specialized facilities. Third, the separation requirements would not be applied to small carriers.⁵³ Additionally, the Commission expressed strong concerns regarding the cost benefits of requiring structural separation in some instances and the effect of the added costs of doing so on customers. None of the Commission's considerations in *Computer II* are present in this instance. First, no special exemption need be established to protect economies of scale, because Section 251 of the Act requires all features and functionalities of the BOC's local exchange operations -- and whatever economies are associated with them -- to be made available to all entities (whether BOC-affiliated or unaffiliated) on a nondiscriminatory basis. Second, unlike the enhanced services market at issue in *Computer II*, the long distance market is already competitive, and BOC entry is not necessary to bring unique services to the market. Further, the costs and benefits of a separate subsidiary

⁵³ See *Amendment of Section 64.702 of the Commission's Rules and Regulations*, 77 F.C.C. 2d 384, 477, ¶ 239 (1980) ("*Computer II*").

requirement have already been weighed in this situation by Congress -- and it concluded that complete separation of the BOCs' local exchange operations from its interexchange operations was appropriate.

To the extent the Commission allows integration between the BOC and its interexchange affiliate, it creates additional opportunities for the BOC to favor that affiliate. This increased risk, in turn, must be addressed by the Commission, most likely through imposition of additional accounting, reporting and monitoring regulations intended to minimize potential competitive harm. CompTel submits that the costs in terms of a greater risk to the public interest and in terms of the Commission's administrative burdens clearly outweigh any potential benefit to the BOC from sharing these functions. Accordingly, the Commission should adhere to a strict interpretation of the structural separation provision and not permit the sharing of business functions on any level.

V. NON-DISCRIMINATION SAFEGUARDS (§§ 65-89)

A. Section 272(e) (§§ 80-89)

In CompTel's view, the specific duties created by Section 272(e) are entirely subsumed within the requirements of Section 272(c)(1). Section 272(c)(1) addresses BOC relations with its affiliates and prohibits any discrimination favoring the affiliates. Section 272(e), by contrast, creates affirmative obligations for BOCs in dealing with all carriers. These obligations are expressly stated as a minimum baseline for non-discrimination. The Commission should interpret Section 272(c)(1) broadly to include at least these same affirmative requirements within that Section. In no case, however, may the Commission's interpretation of Section 272(c)(1) remove or diminish the requirements of Section 272(e).

B. Services vs. Facilities (§§ 86-87)

The terms "service" and "facilities" are used by the Act generally to refer, respectively, to resale of ILEC retail services pursuant to Section 251(c)(4) and to the purchase of unbundled network elements pursuant to Section 251(c)(3) of the Act. Both terms are included within Section 272(c) and 272(e) to make clear that all the obligations and restrictions of those Sections apply both to resold services and to the provision of unbundled network elements.

C. Applicability of Prior Rules (§ 69)

The *NPRM* requests comment on the effect of the Act on existing nondiscrimination safeguards applicable to the BOCs.⁵⁴ CompTel suggests that the Act supplements, but does not replace, nondiscrimination safeguards previously adopted by the Commission. In passing the Act, Congress did not intend to repeal any Commission rules, including its non-discrimination requirements, except where expressly stated or where they are inconsistent with the new legislation. This is clearly stated in Section 261(a) of the Act:

(a) Commission Regulations — Nothing in this part shall be construed to prohibit the Commission from enforcing regulations prescribed prior to the date of enactment of the Telecommunications Act of 1996 in fulfilling the requirements of this part, to the extent that such regulations are not inconsistent with the provisions of this part.⁵⁵

D. Transfer of Network Capabilities (§§ 70-71)

CompTel supports the Commission's tentative conclusions concerning the transfer of existing local exchange network capabilities from a BOC to its affiliate.⁵⁶ The primary purpose

⁵⁴ *NPRM* at § 69.

⁵⁵ 47 U.S.C. § 261(a)

⁵⁶ *NPRM* at § 70.

of Section 272(a) is to separate a BOC's local exchange services from its interLATA services. Any transfer of local exchange functions to that affiliate would undermine this separation, thereby circumventing Congress' chosen regulatory regime. Accordingly, the Commission should prohibit the BOCs from transferring local exchange network capabilities to affiliates. CompTel further agrees with the Commission that if any transfer does occur, the transferee affiliate would become subject to the nondiscrimination requirements of Sections 272(c) and (e). Any other reading of the statute would ensure its circumvention.

E. Section 272(c)(1) (§§ 72-79)

CompTel submits that the blanket prohibition in Section 272(c)(1) against discrimination was clearly intended to be a more stringent standard than the general ban on "unjust or unreasonable" discrimination in Section 202(a). Obviously, the Congress was aware of Section 202(a) at the time it enacted Section 272(c)(1) and, thus, intentionally stated the Section 272 prohibition in more absolute terms. Indeed, the Commission has recently reached the very same conclusion in the *Interconnection Order*, where it concluded that *any* discrimination by the BOC is prohibited by the Act.⁵⁷

There is logic and common sense behind this conclusion. Section 202(a) applies to all telecommunications carriers in all circumstances and therefore must be flexible and recognize that in some situations discrimination might be "just" or "reasonable." In contrast, Section 272(c)(1) applies only to Bell Operating Companies and their treatment of their affiliates. This much narrower context allowed Congress to conclude that *any* discrimination by a BOC in favor of its affiliate is unjust or unreasonable and must be prohibited.

⁵⁷ *Interconnection Order* at ¶ 859.

Examples of the type of discrimination barred by Section 272(c)(1) include introducing rate structures, volume or term discounts, or service offerings that appeal only or uniquely to the BOC's own affiliate. Similarly, the prior precedents for justifying discrimination as reasonable, such as "competitive necessity,"⁵⁸ are not applicable under Section 272(c)(1).

It also is important that the "back office support" necessary for the competitors of the BOCs' affiliates is made equally available. For example, billing and collection, access to credit validation and signalling databases, electronic ordering and provisioning access, and similar necessary mechanisms must be made available on identical terms and conditions to both the BOC affiliates and all competing carriers.⁵⁹

F. Customer Proprietary Network Information (§ 75)

CompTel's views on the CPNI portions of the Act were contained in its comments in CC Docket No. 96-115, filed on June 11, 1996.⁶⁰ At a minimum, it should be made clear in this proceeding, however, that there should be no favoritism given to a BOC affiliate in access to CPNI. Moreover, under Section 222, a BOC affiliate would be a third party with respect to CPNI relating to the customer's use of the local exchange, just as unaffiliated interLATA carriers are, and whatever rules apply to third party access should be equally applicable to BOC affiliate access.

⁵⁸ *AT&T Termination of TELPAK Service*, 64 F.C.C. 2d 959 (1977), *aff'd in relevant part sub nom. ARINC v. F.C.C.*, 642 F.2d 1221 (D.C. Cir. 1980), *cert. denied*, 451 U.S. 920 (1981).

⁵⁹ *Interconnection Order* at §§ 484, 516-18.

⁶⁰ Comments of Competitive Telecommunications Association, CC Docket No. 96-115; *Implementation of the Telecommunications Act: Telecommunications Carriers Use of Customer Proprietary Network Information and Other Customer Information*, CC Docket No. 96-115, Notice of Proposed Rulemaking, FCC 96-221 (rel. May 17, 1996).

VI. MARKETING PROVISIONS (§§ 90-93)

A. Sections 272(g)(2) and 271(e) Are Equivalents (§ 91)

CompTel concurs with the Commission's tentative conclusion that Sections 271(e) and 272(g)(2) are parallel provisions intended to prevent BOCs and the larger interexchange carriers from jointly marketing their local and long distance service offerings prior to the provision by the BOCs of in-region interLATA services. This interpretation is clearly consistent with the legislative history of the Act which explicitly utilizes the term "jointly markets" in its discussion of Section 272(g)(2): "New Section 272(g)(2) permits a BOC, once it has been authorized to provide interLATA service pursuant to new section 271(d), to *jointly market* its telephone exchange services in conjunction with the interLATA service being offered by the separate affiliate in that State as by this section."⁶¹

The marketing provisions of Sections 271(e) and 272(g)(2) are designed to address two principal issues. First, they seek to ensure equal access type obligations that would prevent the BOC from assisting its subsidiary in its marketing efforts. Second, they limit the ability of the BOC to gain an unfair advantage by offering one-stop shopping before their competitors are able to do so. Because Congress' purpose in enacting the joint marketing prohibitions are similar to those that motivated the DOJ in the Ameritech Customers First proceeding, CompTel believes that the marketing approach ultimately included in the Ameritech Customers First Plan establishes a solid guideline for implementation of the Act's marketing requirements. Accordingly, any joint marketing plan implemented by the Commission should, at a minimum, include the following prohibitions:

⁶¹ H.R. Conf. Rep. No. 104-458, 104th Congress, 2d Sess. 152 (1996) (emphasis added).

- (1) BOC salespersons who receive inquiries by prospective local exchange customers cannot not recommend, sell, or otherwise market the interexchange service of any interexchange carrier. Salespersons must also administer interexchange carrier services on a carrier-neutral and nondiscriminatory basis;
- (2) The affiliate interexchange carrier cannot sell exchange services or exchange access service unless those services are tariffed and were established by the local exchange operations prior to the time the interexchange subsidiary begins to market such services;
- (3) Employees of the local exchange operations may not for any reason advise existing local exchange customers that the BOC or its affiliate provides interexchange service. Nor may the local exchange company employee transfer a call from a local exchange customer to its interexchange subsidiary;
- (4) The BOC cannot sell or contract to sell any service at a price that is contingent upon the customer obtaining interexchange service from the interexchange affiliate; and
- (5) The BOC and its interexchange affiliate are prohibited from making joint appearances or any other presentations to customers except on terms, rates and conditions provided to interexchange carrier not associated with the local exchange customer.

CompTel believes that these safeguards provide the necessary mechanisms to prevent any prohibited joint marketing efforts from occurring. The prohibitions are clear and comprehensive and fully within the Commission's authority under Section 272(g)(2) and CompTel urges their adoption by the Commission.

VII. ENFORCEMENT OF SECTIONS 271 AND 272 (§§ 94-107)

A. The Act Augments the FCC's Powers (§ 97)

CompTel agrees with the Commission's conclusion that Section 271(d)(3) augments the FCC's power to adjudicate complaints of anticompetitive behavior by the BOCs. Although the Conference Committee Report does not include a detailed discussion of the Congressional intent in implementing Section 271(d)(6), the Senate Conference Report explicitly states that the penalties added to the Communications Act of 1934 pursuant to the new telecommunications law "are in addition to any other penalties that may be applicable under the 1934 Act or law."⁶² Moreover, Section 261 explicitly provides for the continued application of regulations already in place prior to the passage of the Act, provided that the regulations are not inconsistent with the new provisions.⁶³ To make Section 271 exclusive of other enforcement mechanisms already contained in the Communications Act of 1934 would most certainly dilute the Commission's ability to penalize violators to the fullest extent of the law and severely limit public recourse against prohibited behavior by BOCs. Accordingly, the Commission should conclude that Section 271(d)(6) was incorporated to augment the enforcement authority provided by the Communications Act of 1934 prior to the passage of the Act and was not intended to limit the recourse of the FCC or the general public.

⁶² *Telecommunications Competition and Deregulation Act of 1995-Report of the Committee on Commerce, Science and Transportation*. S. Rep. 104-23, 104th Congress, 1st Sess. 47 (1995).

⁶³ Section 261(a) states "[n]othing in this part shall be construed to prohibit the Commission from enforcing regulations prescribed prior to the date of enactment of the Telecommunications Act of 1996 in fulfilling the requirements of this part, to the extent that such regulations are not inconsistent with the provisions of this part." 47 U.S.C. § 261(a).

B. The BOC Should Make All Services Provided to its Affiliate Available to Unaffiliated Entities Upon Request (¶ 96)

To further facilitate the detection of violations of the Act's separate affiliate requirement and nondiscrimination safeguards, the Commission must require BOCs to provide all unaffiliated entities with the same services provided to its interexchange affiliate upon request. In other words, if any unaffiliated entity asks for any service offering that has been provided to the affiliate interexchange carrier, the BOC must provide the requested service with no variations.

CompTel emphasizes that the Commission must be vigilant in guarding against potential manipulation of this requirement by the BOCs. For example, in an obvious attempt to circumvent the resale provisions of Section 251(c)(4), US West recently attempted to "withdraw" its Centrex service in each of the states in its operating territory, although it grandfathered all existing customers indefinitely. As the Commission emphasized in its *Interconnection Order*, this type of evasion of the Act is a legitimate area of concern.⁶⁴ Clearly, the potential for similar evasions of the above safeguard are possible. The Commission should make clear that BOC attempts to resist providing services to unaffiliated entities will not be tolerated.

C. CompTel Supports the Commission's Proposed Procedural Requirements to Adjudicate Claims (¶¶ 98-104)

CompTel agrees with the Commission's tentative conclusion that the statute allows the Commission to adjudicate claims that a BOC has ceased to meet the conditions of its approval to provide in-region interLATA services through the resolution of an expedited complaint

⁶⁴ *Interconnection Order* at ¶ 968. In the context of resale services, the Commission concluded that initial regulation of this activity was best left to the states because many states already have rules regarding the withdrawal of services. *Id.* This consideration is not applicable in the interLATA context, however, which primarily has been a federal, not state, concern.

procedure pursuant to Section 271(d)(6)(B) or through its own motion.⁶⁵ CompTel encourages the Commission to enhance detection of any anticompetitive behavior by the BOC by facilitating the ability of injured parties to bring alleged wrongdoing to the Commission's attention. Section 271(d)(6)(B) permits the Commission to establish the procedures that it deems necessary to review complaints concerning failures by a BOC to meet the conditions required for approval under 271(d)(3), requiring only that the Commission act on a complaint within 90 days. Expedited complaint procedures would further the goal of this section, and certainly are not inconsistent with it.

Likewise, Section 271(d)(6)(B) does not preclude the Commission from adjudicating a complaint arising from its own motion. This interpretation is consistent with other enforcement provisions of the Communications Act of 1934 which permit the Commission to initiate enforcement proceedings through its own motion. For example, Section 204 of the Communications Act of 1934 permits the Commission to establish a hearing to determine the lawfulness of any new or revised charge, classification or regulation based upon a complaint filed by a third party or on the Commission's own motion. Similarly, Section 205 charges the Commission with the authority to initiate a hearing to investigate the lawfulness of any charge, classification, regulation or practice of any carrier that would be in violation of the Communications Act of 1934. Thus, in light of other enforcement provisions contained in the

⁶⁵ In the *NPRM* the Commission states "[w]e believe that there are two ways in which the Commission may determine that a BOC has ceased to meet the conditions of its approval. First, the Commission could make such a determination via the resolution of an expedited complaint proceeding pursuant to section 271(d)(6)(B). Second, the Commission could make such a determination on its own motion." *NPRM* at ¶ 98.

Communications Act of 1934, it is reasonable to interpret Section 271(d)(6) to apply to complaints submitted by individuals as well as through the Commission's own motion.

CompTel also submits that a complainant meets its *prima facie* obligation if it pleads facts, which if true, state a case. Such a standard is consistent with the FCC's existing formal complaint rules,⁶⁶ and also is consistent with standards traditionally recognized by courts to determine when a case should go to the jury.⁶⁷ To require a higher burden would substantially minimize an injured party's ability to bring complaints before the Commission. Moreover, a higher threshold would weaken the Commission's ability to enforce complaints filed pursuant to Section 271(d).

Upon the plaintiff's establishment of a *prima facie* case, the burden should shift to the defendant, as proposed in the *NPRM*.⁶⁸ This position is the most economical way to ensure full achievement of the enforcement provisions of the Act. In most instances, the key facts and information will be in the control of the defendant BOC. In particular, only the BOC will have all the necessary documents concerning transactions between it and the interexchange affiliate. Given that the Commission's complaint procedures provide for very little discovery,⁶⁹ it would be unfair to require plaintiffs to produce pertinent information regarding the activities of a

⁶⁶ 47 C.F.R. § 1.720(b).

⁶⁷ Wright & Miller, Federal Practice and Procedure, § 1202.

⁶⁸ See *NPRM* at ¶ 102. In the *NPRM*, the Commission reasons that "[b]ecause the defendant BOC is likely to be in sole possession of information relevant to the complainant's case, and because the complaint must be acted upon in 90 days, we believe that shifting the burden may be an efficient way of resolving complaints invoking the expedited procedures of Section 271(d)(6)." *Id.*

⁶⁹ See 47 C.F.R. §§ 1.729, 1.730.

transaction to which it was not a party. By shifting the burden to the defendant, the Commission can better assure that the BOC will submit all necessary documents related to the transaction in attempts to prove its innocence.

Further, CompTel is in complete agreement with the Commission's tentative conclusion not to employ a presumption of reasonableness in favor of the BOC or BOC affiliates.⁷⁰ To extend a presumption of reasonableness is naive and would likely inhibit the goal of promoting further competition in all telecommunications markets. While CompTel would like to believe that all parties -- BOCs, their affiliates and competitors alike -- will always act consistently with the pro-competitive goals of the Act, experience tells us that this is unlikely. Companies motivated by profit and the desire to maximize market shares are likely to engage in anticompetitive behavior, *if* they have the ability to do so. Accordingly, CompTel submits that the application of a presumption of reasonableness to the BOCs' activities is premature at this time.

D. Sanctions Should Be Determined on a Case-by-Case Basis (¶ 106)

Finally, CompTel submits that the Commission should decide complaints alleging anticompetitive or discriminatory behavior on a case-by-case basis. Because the entry of the BOCs into the in-region interLATA market is completely untested, it would be unwise for the Commission, at this point, to adjudicate claims through the rulemaking process. There exists an endless number of situations that could arise, each of which could potentially present facts different from the cases tried before it. Thus, CompTel believes that a case-by-case method of

⁷⁰ See *NPRM* at ¶ 104.

adjudicating claims is most appropriate at this juncture because it provides the Commission with the needed flexibility to decide new issues as they arise.

VIII. THE COMMISSION SHOULD NOT EXTEND NON-DOMINANT REGULATION TO BOC AFFILIATES (¶¶ 108-152)

The Commission recently issued a *Report and Order* in CC Docket No. 96-21 adopting interim rules for BOC offering of out-of-region interLATA services.⁷¹ There it was decided that, as an interim matter, out-of-region BOC interLATA services will be regulated as non-dominant if provided through a separate affiliate meeting certain criteria. The requirements for non-dominant treatment include: (1) separate books of account; (2) no joint ownership of transmission or switching facilities; and (3) use of all LEC services pursuant to tariff.⁷² These rules are the same as those imposed on independent telephone companies that offer interLATA services.⁷³

Similarly, the *BOC Out-of-Region Order* applies the cost allocation and affiliate transaction rules to out-of-region interLATA services.⁷⁴ This, too, is modeled on the Commission's regulations for the independent telephone companies' interLATA services.

Over the objections of CompTel and several other commenting parties, however, the Commission declined to include additional safeguards in the interim rules for out-of-region services. For example, the BOCs and their interLATA affiliates "will be able to share personnel

⁷¹ See *BOC Out-Of-Region Order*.

⁷² *BOC Out-of-Region Order* at ¶ 8.

⁷³ *Competitive Carrier Fifth Report and Order*, 98 F.C.C. 2d 1191.

⁷⁴ *BOC Out-Of-Region Order* at ¶ 19.

and other resources or assets" and the "affiliate may be staffed by BOC personnel, housed in existing BOC offices, and use BOC marketing or other services."⁷⁵ This intermingling of local and interLATA operations and functions will not meet the requirement of Section 272(b)(1) that the interLATA affiliate "operate independently," as well as other aspects of Section 272(b).⁷⁶

The minimal requirements adopted in the *BOC Out-of-Region Order* are not sufficient for purposes of this proceeding. That model is insufficient for one obvious reason: BOC provision of in-region services presents completely different -- and far more threatening -- problems than those raised by BOC out-of-region services. Within its own region, a BOC has direct control over local exchange facilities essential to the completion of each and every interLATA call originating or terminating within the area. This complete control presents a plethora of opportunities -- some subtle, some more direct -- for the BOC to favor its interLATA affiliate. These additional opportunities require additional requirements tailored to the unique dangers presented within the BOC's local service region.

A. Relevant Product Market (§§ 116-120)

Just as the circumstances of BOC out-of-region services are not relevant precedents for the regulation of BOC in-region services, the product market definition employed by the *Competitive Carrier Proceeding* is not adequate to address the BOCs' market power within its region. Although the Commission adopted a single product market for all interexchange services in the *Competitive Carrier Proceeding*, that decision was made upon the understanding that the

⁷⁵ *Id.* at ¶ 22.

⁷⁶ The FCC's rules governing out-of-region services, however, are only interim. There is another pending proceeding (Docket No. 96-61) addressing permanent rules for out-of-region services.

BOCs, with local market shares of 98% or more, would not be participants in the market. Under the new paradigm established by the Act, this assumption is incorrect, and the relevant product market must be reassessed.

A significant consideration in defining the relevant product market for assessing the BOCs' market power is whether the telecommunications service in question relies upon or is related to the BOC's local telephone network. For example, no BOC has market power in satellite-delivered video services because those are transmitted directly to the end user without transiting the BOC network. By contrast, a BOC does have market power where a service must make use of the public switched telephone network within its region. Indeed, there is no rational basis for treating all interstate, interexchange services as interchangeable where a BOC with monopoly control of bottleneck facilities is concerned. To properly take the BOCs' networks into account, the relevant product market should be those services relying on or utilizing the BOCs' local network.

B. Relevant Geographic Market (§§ 122-128)

CompTel agrees with the Commission's tentative conclusion that the BOCs' control of bottleneck local exchange and exchange access facilities constitutes evidence that "there is or could be a lack of competition" for in-region interLATA services.⁷⁷ Accordingly, whether the BOC affiliate is operating within the BOC region or outside of it is a relevant consideration. The Commission, therefore, should modify its geographic market definition to treat as a separate geographic market any area where the interLATA entity or one of its affiliates is an incumbent

⁷⁷ *NPRM* at ¶ 126.

local exchange carrier as defined in the Act.⁷⁸ The fact that Congress legislated a different treatment for in-region services than for out-of-region constitutes strong evidence that regions where the BOC is the incumbent local exchange carrier constitute separate and distinct geographic markets. Thus, the Commission should modify its definition of the relevant geographic market to accommodate this consideration.

C. Classification of BOC Affiliates (§§ 130-152)

The *NPRM* recognizes that, in order to classify the interLATA affiliates of BOCs as non-dominant, the Commission's rules "require [it] to determine that the BOC affiliates will not possess market power in the provision of those services in the relevant product and geographic markets."⁷⁹ While this represents a correct statement of the analytical question, for present purposes this question is beside the point. A BOC clearly possesses market power within its region. The BOC's affiliate, because it is under common ownership and control, also clearly possesses market power in that region. The appropriate question, therefore, is whether, despite this market power, the Commission's conditions sufficiently protect against the exercise of this power such that nondominant carrier regulation can be extended without harming the public interest. CompTel submits that the answer to this question clearly is that the Commission's conditions are inadequate to justify nondominant carrier regulation.

⁷⁸ Thus, for purposes of classifying an interexchange carrier, there potentially would be two geographic markets to consider. First, the Commission should consider the United States as a whole as one geographic market. In addition, however, the Commission should assess market power in any region where the entity also is, or is affiliated with, an incumbent local exchange carrier under the Act.

⁷⁹ *NPRM* at ¶ 130.

Although the *NPRM* purports to analyze the BOC affiliate's market power, the Commission has failed to apply the proper standard in that analysis. After recognizing that the Commission's rules (and common sense) require an affirmative finding that no such market power is present,⁸⁰ the *NPRM* utterly fails to apply this standard. Instead, by stating that, "[f]or purposes of market power analysis . . . we are concerned with improper allocation of costs *only* to the extent it enables a BOC affiliate to set retail interLATA prices at predatory levels . . . , drive out of its interLATA competitors, and then raise and sustain retail interLATA prices *significantly* above competitive levels,"⁸¹ the *NPRM* ignores many salient facts and makes a finding of market power virtually impossible. This is not the basis for reasoned decision making.

First, this standard completely ignores the fact that the Commission has been charged by Congress with managing a transition process. Indicating that the *only* concern with improper cost allocation is that it not be so severe that the BOC affiliates drive all other carriers out of business is beyond the intent of Congress. To state that the *only* concern is whether the BOC affiliates drive every other carrier out of business *and then raise prices "significantly above competitive levels"* is indefensible. The Commission cannot seriously adopt a standard where even driving all interLATA competitors from the market is permissible if the remaining monopolist raises prices only somewhat above competitive levels.

Second, even when seeking to make an affirmative finding on such an absurd standard, the *NPRM* finds it necessary to rely on untested assumptions. The *NPRM* states that "we believe

⁸⁰ *Id.*

⁸¹ *Id.* at ¶ 135 (emphasis added).

that the safeguards will be effective,"⁸² "we believe" that price caps will assist in preventing anti-competitive conduct,⁸³ and "it is questionable"⁸⁴ whether a BOC could successfully engage in predation. These are not the sort of definitive findings on which an important affirmative conclusion can be based.

Third, despite the need for an affirmative finding to remove dominant regulation, the burden of persuasion is effectively shifted to those parties advocating dominant carrier treatment. Specifically, the *NPRM* requires parties favoring retention of dominant carrier regulation for BOC affiliates to comment on:

- whether dominant carrier regulation would provide any additional protection against exercise of market power beyond that provided by other safeguards;⁸⁵
- which, "if any," of the dominant carrier regulations would constrain the BOC affiliates' ability to gain and exercise market power;⁸⁶and
- whether there are additional administratively workable and less burdensome safeguards that would permit non-dominant regulation.⁸⁷

⁸² *Id.* at ¶ 135.

⁸³ *Id.* at ¶ 136.

⁸⁴ *Id.* at ¶ 137.

⁸⁵ *Id.* at ¶ 143.

⁸⁶ *Id.*

⁸⁷ *Id.*

These matters all suggest that non-dominance is presumed unless the advocates of dominant carrier regulation can carry the burden of proof. This is not the proper allocation of burden, as acknowledged by the *NPRM*.⁸⁸

CompTel submits that the proper approach to the regulation of BOC affiliates is one modeled on the Commission's prior experiences in the *Competitive Carrier Proceeding* and BOC provision of enhanced services. In both cases, the Commission moved cautiously, imposing a stringent set of initial regulations and then reducing them over time as actual marketplace experience allowed. While the *NPRM* cites these two experiences as useful examples, it hints that the Commission may have learned the wrong lesson. The teaching of those proceedings is not that initial safeguards are necessary. Rather, the real lesson is that a gradual phase-in of the regulatory regime allows the Commission to proceed rationally and cautiously, taking each new step based on the factual experience gathered in actual operations under the prior set of regulations.

The overriding purpose of the Act and this proceeding is to introduce a regulatory scheme which leads to competition in all telecommunications industry segments to the benefit of the public. To that end, the Commission is given the responsibility of managing a difficult transition process for BOC entry into in-region interLATA services. The Commission cannot fulfill this responsibility by caring "only" about whether the BOC affiliates will be able to run every other carrier out of business and then "significantly" overcharge the public. And it cannot fulfill this responsibility by *assuming* the answers to its questions and challenging commenters to prove its assumptions incorrect.

⁸⁸ *Id.* at ¶ 130.

The proper standard in managing this significant shift in the telecommunications environment is to determine whether there is a substantial possibility that the BOCs or their affiliates will be able to impede competition. And the most rational means of ascertaining this is to act on the basis of actual experience, not theories or presumptions.

It is CompTel's view, then, that the BOC affiliates should initially be classified as dominant carriers for the provision of in-region interLATA services which utilize the BOCs' local exchange and exchange access network or other BOC facilities. As with prior classifications of carriers, after a period of actual operation under this regime, the Commission can determine whether relaxation of the rules to non-dominant status is appropriate.

CONCLUSION

For all the foregoing reasons, the Commission should adopt the rules and policies proposed by the *NPRM*, as modified by the preceding discussion.

Respectfully submitted,

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